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10 Attorneys for Plaintiff  
11 FACEBOOK, INC.

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN JOSE DIVISION

16 FACEBOOK, INC.,

17 Plaintiff,

18 v.

19 STUDIVZ LTD., HOLTZBRINCK  
20 NETWORKS GmbH, HOLTZBRINCK  
VENTURES GmbH, and DOES 1-25,

21 Defendant.  
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Case No. 5:08-cv-03468 JF

**FACEBOOK'S REPLY IN SUPPORT  
OF ITS MOTION TO COMPEL  
PERSONAL JURISDICTION  
DISCOVERY**

Date: March 3, 2009  
Time: 10:00 a.m.  
Room: Courtroom 2, 5th Floor  
Judge: Honorable Magistrate Judge  
Howard R. Lloyd  
for Discovery Purposes

1     **I.     INTRODUCTION**

2             Defendants have previously agreed that Facebook is entitled to personal jurisdiction  
3     discovery, including personal jurisdiction discovery that is also intertwined with the merits of the  
4     case. Defendants expressly conceded the issue in front of this Court during the December 16,  
5     2008 hearing on Defendants premature Motion for Protective Order. True to their ways,  
6     however, Defendants now attempt to backtrack on that clear and unequivocal statement. Indeed,  
7     in their opposition brief Defendants now seemingly argue that Facebook should not get the  
8     requested discovery either because Facebook has not established a *prima facie* showing of  
9     personal jurisdiction or because of their newly-raised theories regarding German privacy laws.  
10    Defendants are wrong on all accounts, both factually and legally. Defendants' opposition is  
11    merely more of the same: obfuscation and delay. Enough is enough. Facebook has met and  
12    conferred in good faith and has narrowed discovery requests to relate to the personal jurisdiction  
13    issues raised by Defendants' motions. Defendants should now be compelled to fully and  
14    adequately respond to the discovery requests at issue and immediately provide 30(b)(6) witnesses  
15    who will testify completely as to the personal jurisdiction issues – including those that touch upon  
16    the merits of this case.

17    **II.    ARGUMENT**

18           **A.    Defendants Are Improperly Attempting To Litigate The Issue Of Whether**  
19           **Facebook Is Entitled To Personal Jurisdiction Discovery.**

20           On December 16, 2008, Defendants stood before this Court and conceded that Facebook  
21    is entitled to personal jurisdiction discovery. Even more, Defendants stated that Facebook is  
22    entitled to discovery in which the merits of the case are intertwined with the personal jurisdiction  
23    aspects. Specifically, the Court began the hearing on Defendants' Motion for Protective Order by  
24    asking Defendants if they had a "problem" with personal jurisdiction discovery that also touched  
25    on merits discovery. Defendants clearly and unequivocally agreed that Facebook was entitled to  
26    such discovery and that their motion, which was premature and ultimately withdrawn, was only  
27    targeted at purely merits-based discovery.

28           THE COURT: As I understand it, the defendants agree that if, in the  
          course of investigating personal jurisdiction, that discovery would

1                   also go to the merits, that that wouldn't be a problem.

2                   Mr. SMITH: That's correct, Your Honor.

3                   THE COURT: Okay. So, your objection is to discovery which is  
4                   solely, you say, directed at merits at this time?

5                   MR. SMITH: That's correct, Your Honor.

6                   THE COURT: And that would apply to the depositions, too. In  
7                   other words, you're not opposed to a deposition - - and I know there  
8                   were several sought - - that are on personal jurisdiction issues, at  
9                   this time?

10                  MR. SMITH: That's correct, Your Honor, two of them are  
11                  currently scheduled to occur in January.

12                  See Docket No. 90-15, p. 2-3. Unfortunately, as set forth in Facebook's moving papers, after  
13                  making such statements in open court, and indicating that they would fulfill their discovery  
14                  obligations, Defendants made an immediate about-face. Within a few days of the hearing,  
15                  Defendants produced only a handful of documents, none of which relate to the Defendants'  
16                  design and development of Defendants' infringing websites or Defendants' accessing of  
17                  Facebook's website and intellectual property. As Facebook has repeatedly explained to  
18                  Defendants, such issues relate directly to personal jurisdiction under the *Calder* effects test – even  
19                  though they also may touch upon the merits of Facebook's claims. During the meet and confer  
20                  process, however, Defendants have seemingly forgotten their statements to the Court that they  
21                  “had no problem” with producing such discovery. Rather, they have obstinately refused to  
22                  provide any such “intertwined” discovery.

23                  Worse yet, in their opposition papers Defendants now backtrack even further and claim  
24                  that Facebook is not entitled to any discovery. See StudiVZ's Opposition Brief, pp. 6-8.  
25                  Defendants for the first time now argue that Facebook should be denied discovery altogether  
26                  because it has purportedly not established a “*prima facie*” showing that jurisdiction exists and that  
27                  Facebook should be denied. *Id.* But Defendants have already conceded that Facebook is entitled  
28                  to personal jurisdiction discovery – even personal jurisdiction discovery that also goes to the  
                    merits of the case. Moreover, they specifically stated in their reply brief for the ill-conceived  
                    Motion For Protective Order, that “Defendants do not seek to bar Facebook from taking discovery

1 that relates to disputed issues raised by the Motions to Dismiss even if such discovery may also  
2 touch on the merits.” Defendants’ Reply In Support of their Motion for Protective Order (Docket  
3 No. 63), p. 7: 6-8. In that brief, Defendants claimed that they were “being accommodating” by  
4 allowing Facebook such personal jurisdiction discovery without first requiring Facebook to  
5 establish “that it is entitled to such discovery.” *Id.*, p. 7:8-p.8:15. Consistent with their  
6 unprofessional tactics and gamesmanship, Defendants have changed their position - again. The  
7 problem is, they never raised the issue during the December and January meet and confer  
8 sessions. Rather, they continued to pay lip service to their previous concessions that they would  
9 permit discovery that went to both personal jurisdiction and the merits of the case.<sup>1</sup> Of course,  
10 they have refused to provide any such discovery.

11 Defendants’ arguments related to a “*prima facie*” or colorable showing are both legally  
12 and factually wrong. As Facebook stated in its opening papers, in the Ninth Circuit, Facebook is  
13 not required to make a *prima facie* showing of jurisdiction in order to get discovery to establish  
14 jurisdiction. Indeed, in the Ninth Circuit, it is an abuse of discretion to refuse discovery regarding  
15 personal jurisdiction where jurisdiction has been the subject of an initial challenge by way of  
16 motion to dismiss. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122,  
17 1135 (9th Cir. 2003). Defendants have even conceded that there exists contrary California  
18 authority for the arguments they make. *See* Opposition (Docket No. 94), p.7, note 5. Regardless,  
19 even if the standards suggested by Defendants are used, Facebook has made a *prima facie* or  
20 colorable showing that this Court has jurisdiction over the Defendants.

21 Facebook provides much more than mere speculation regarding Defendants’ activities that  
22 support personal jurisdiction. Importantly, Defendants do not dispute that their websites are  
23 virtual clones of Facebook’s widely popular site. Nor could they. As set forth in detail in  
24 Facebook’s Complaint, many users of both Facebook and Defendants’ sites have commented that

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25 <sup>1</sup> Incredibly, Defendants even seem to be changing their position that Facebook is entitled to  
26 personal jurisdiction discovery that is intertwined with the merits of the case. Specifically, in  
27 footnote 5 on page 7 of their opposition brief (Docket No. 94), they claim that “Facebook’s  
28 remaining discovery requests are improper. . . the requests are overwhelmingly *not* limited to  
personal jurisdiction.” But they have already conceded to the Court and Facebook that the  
requests do not need to be “limited to personal jurisdiction.” Rather, they can go to the merits  
also.

1 Defendants' sites are "clones" of Facebook and that with the exception of the colors and the  
2 languages, the sites are virtually identical. Complaint (Docket No. 1), ¶¶ 27-39. Others have  
3 commented that there are numerous indications that the code for Defendants' sites is based on  
4 Facebook's code and the exact names of Facebook's files (written in English) are also seen in  
5 Defendants' code for their German language sites. *Id.*, ¶ 35, Exs. 12 and 16.

6 The undisputed evidence of Defendants' copying of Facebook's site, and concomitant  
7 trade dress infringement, is enough to establish a colorable claim of personal jurisdiction over  
8 Defendants. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1283-84 (11th Cir. 2008) (holding that  
9 the out-of-state Defendant's unauthorized use of the plaintiff's trademark and misappropriation of  
10 his name and reputation for commercial gain satisfied the *Calder* effects test). The evidence of  
11 Defendants' copying also suggests that Defendants created their clone sites by accessing  
12 Facebook's site and servers in order to copy every last detail of Facebook's website - right down  
13 to the size of the columns and the number of pixels on the screen. Such activities also support  
14 personal jurisdiction over Defendants pursuant to *Calder* and its internet-related progeny. *See*  
15 Facebook's Motion to Compel (Docket No. 91), pp. 11:10-13:19. Defendants' use of  
16 Facebook's source code to create identical, German-language versions of Facebook's site further  
17 establishes personal jurisdiction over Defendants. *Id.* Thus, Facebook is entitled to discovery  
18 related to Defendants' design and development of their sites, as well as the accessing of  
19 Facebook's site, servers and code – regardless of whether such discovery also touches upon the  
20 merits of the case.

21 **B. Facebook Has Attempted To Narrow Its Requests To Address The Issues**  
22 **Raised By Defendants' Motions To Dismiss.**

23 In their Opposition, Defendants throw around a bunch of numbers and percentages to  
24 suggest that they have largely complied with Facebook's discovery requests. Defendants'  
25 arguments are misleading and irrelevant. In an effort to narrow the parties' discovery disputes,  
26 Facebook selected a handful of interrogatories and document requests that were critical to the  
27 issues raised by Defendants' motions to dismiss. The Court should in no way infer that Facebook  
28 was completely satisfied with Defendants' other responses, as Defendants suggest. It was not and

1 still is not. Facebook has chosen to pick its battles with Defendants in order to streamline this  
2 process and conserve judicial resources as much as possible.

3 In reality, the most important statistic is how Defendants responded to the discovery  
4 requests at issue in this motion. For these discovery requests, Defendants have provided no  
5 responses or documents. Despite their (repeated) concession that Facebook is entitled to personal  
6 jurisdiction discovery that also touches on the merits of the case, Defendants have provided no  
7 design and development documents related to how they developed their clone of the Facebook  
8 site, they have provided no source code, they have provided no documents related to how and  
9 when Defendants' employees accessed Facebook for "commercial purposes." Nor have they  
10 provided complete and satisfactory answers to such interrogatories. Rather, Defendants have  
11 attempted to hold such discovery hostage by offering to produce "smoking gun" documents –  
12 only if Facebook agreed sight unseen to waive its rights to compel additional documents and  
13 discovery from Defendants. Facebook is entitled to a broader range of discovery than just the  
14 documents that establish on their face Defendants' wrongful conduct. Since Defendants believe  
15 they have done nothing wrong through their wholesale copying of the design of Facebook's  
16 website, they cannot be entrusted to make the determination as to what narrow subset of  
17 documents should be produced. Discovery, even as to personal jurisdiction issues, is broader than  
18 that.

19 **1. Defendants Should Be Compelled To Respond Completely To**  
20 **Facebook's Discovery Requests Related to Defendants' Accessing of**  
**the Facebook – Interrogatory 10; Requests For Production 14, 28, 29**

21 **a. Facebook Has Narrowly Tailored the "Access" Discovery**  
22 **Requests Through the Meet and Confer Process.**

23 During the meet and confer sessions, Defendants have repeatedly conceded that  
24 Defendants' employees have accessed Facebook for "commercial purposes." Indeed, it seems  
25 highly unlikely, if not impossible, that Defendants could have created and updated their clone  
26 sites without regularly accessing Facebook's site and servers. Facebook has attempted to reduce  
27 the burden on Defendants, and avoid the German privacy law issues, by limiting Defendants'  
28 responses and documents to situations where Defendants design and development employees

1 have accessed Facebook for commercial purposes in furtherance of the jobs. Additionally, with  
2 respect to the document requests, Facebook has offered to narrow the requests to a core group of  
3 employees (whether it be 10, 20 or 30 employees) who necessarily would have access to such  
4 documents and information. Defendants have steadfastly refused to produce such highly relevant  
5 documents and provide no valid basis for withholding them.

6 Simply put the information requested by Facebook is narrowly tailored to address the  
7 personal jurisdiction issues raised by Defendants' motions to dismiss. Accordingly, Facebook  
8 requests that the Court compel Defendants to completely and adequately respond to Interrogatory  
9 No. 10 and supply the requested documents in response to Document Requests 14, 28 and 29.

10 **b. Defendants' Newly-Raised German Privacy Law Argument Is a**  
11 **Red Herring.**

12 Defendants newly-raised arguments related to the German privacy laws and blocking  
13 statutes are without merit and yet another improper attempt on the part of Defendants to avoid the  
14 discovery they already stated they would supply. First, the cases cited by Defendants generally  
15 allow for discovery under these circumstances. *See, e.g., Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D.  
16 503 (N.D. Ill. 1984). Second, as set forth above, Facebook seeks only limited information  
17 regarding persons who accessed Facebook in furtherance of their jobs for Defendants. Facebook  
18 does not seek personal information, such as their home addresses, personal telephone numbers,  
19 financial information, or the content of their personal emails. *Cp. Volkswagen, A.G. v. Valdez*,  
20 909 S.W. 2d 900 (Tex. 1995). Third, Defendants' arguments fail to establish that the disclosure  
21 of such information is strictly prohibited under German blocking statutes. Fourth, Defendants  
22 have already provided some of this information in the form of the organizational charts.  
23 Defendants fail to show how providing a few more names somehow runs afoul of the German  
24 blocking statutes. Fifth, Defendants are in sole possession of this information and Facebook  
25 requires the information in order to oppose Defendants' motion to dismiss and litigate the case.  
26 The balance of the competing interests weighs in favor of compelling Defendants to respond.  
27 Sixth, Defendants have suggested no alternatives that would comply with German law and still  
28 allow Facebook to receive the information it needs to litigate the case. Seventh, Defendants have

1 only recently raised these German privacy law issues as a way to block Facebook's discovery.  
2 Indeed, Defendants failed to raise this supposedly compelling issue in their previous Motion for  
3 Protective Order. Nor did they raise the issue during the meet and confer process, with the  
4 exception of a concern over Defendants' employees' private emails, which Facebook does not  
5 want. Defendants' belated arguments concerning German privacy laws should not be permitted  
6 to defeat Facebook's long outstanding, and narrowly tailored, discovery requests.

7 **c. Facebook is Entitled to Know Which of Defendants' Employees**  
8 **Became Facebook Users For Commercial Purposes In**  
9 **Furtherance of Their Jobs.**

10 Additionally, despite Defendants' arguments, information concerning which of  
11 Defendants' employees became Facebook users for commercial purposes and are subject to  
12 Facebook's Terms of Use is highly relevant to the personal jurisdiction issues. First, Facebook  
13 cannot possibly access this information (even if it possessed the ability to do so), since  
14 Defendants are withholding the names of such persons. Second, if Defendants directed their  
15 employees to register as a Facebook user in order to monitor and copy Facebook's design and  
16 features, such employees would have enrolled in Facebook, and violating Facebook's Terms of  
17 Use, as agents of Defendants. Such information regarding Defendants' intentional actions aimed  
18 at Facebook is highly relevant to the personal jurisdiction issues raised by Defendants. Moreover,  
19 such activity on the part of Defendants may give rise to a claim for intentional interference with  
20 contractual relationship between the Defendants' employees and Facebook - yet another  
21 intentional tort that would support personal jurisdiction over Defendants.

22 Finally, Defendants' argument that Facebook has somehow waived its jurisdiction/forum  
23 clause is baseless. StudiVZ filed a preemptive declaratory judgment case in Germany the same  
24 day Facebook filed the current action. Unfortunately, Facebook was required to respond to  
25 StudiVZ's German action, and did just that. Facebook did not chose to litigate any of its claims  
26 in Germany, but is now required to do so because of Defendants' forum shopping.  
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1                               **2. Defendants Should Be Compelled to Respond Completely To**  
2                               **Facebook's Discovery Requests Related To The Design And**  
3                               **Development Of Defendants' Infringing Websites – Interrogatories**  
4                               **15, 16; Requests For Production 16, 23, 25**

5               As set forth above and in Facebook's moving papers, there is no dispute that Defendants'  
6               infringing sites are nearly identical to Facebook. Facebook is entitled to Defendants' design and  
7               development documents, which will undoubtedly show that Defendants repeatedly, and  
8               improperly, accessed Facebook's site and servers to steal Facebook's design and functionality.

9               Again, in an effort to narrow the requests, Facebook offered to limit Document Requests  
10              16 and 25 to creation, design and development documents from a core group of custodians who  
11              would have authored or received the relevant documents. Defendants, however, tried to  
12              improperly limit the production of documents to items that on their face would establish  
13              Defendants' wrongdoing. And Defendants would only produce those documents if Facebook  
14              agreed to waive its right to compel all other design and development documents. Facebook is  
15              entitled to all documents that relate to how Defendants created, designed and developed their  
16              infringing, clone websites.

17             Additionally, in light of the fact that Defendants' websites are virtually identical, and the  
18             filenames found in Defendants' code that indicate that Defendants had access to and copied  
19             Facebook's code, Defendants should be compelled to produce all major versions of their source  
20             code pursuant to Document Request No. 23. StudiVZ is less than four years old. The burden to  
21             Defendants related to such a production is minimal. Defendants have offered no valid  
22             justification for withholding such relevant documents in light of Facebook's efforts to narrow the  
23             discovery requests.

24             With respect to Interrogatories Nos. 15 and 16, contrary to Defendants' assertions,  
25             Facebook never agreed to two partial snapshots of StudiVZ's organizational charts. During the  
26             meet and confer process, Facebook clearly requested additional names. In response to  
27             Defendants arguments that many of Defendants' employees are involved with the "maintenance"  
28             of Defendants' sites, Facebook limited the interrogatories to Defendants' employees who were  
                involved with the creation, design and development of the Defendants' sites. Defendants'

1 infringing sites were first launched in 2005. StudiVZ is less than four years old. There can be  
2 little burden on Defendants to provide the names of all such persons. Defendants' objections and  
3 arguments are not well-founded.

4 **3. Facebook Is Entitled To Responses Regarding The "Adhesion**  
5 **Contracts."**

6 Without reviewing the discovery responses or documents, Defendants make the  
7 unsupported claim that all so-called adhesion contracts only go to general jurisdiction issues.  
8 However, without additional information regarding these supposedly numerous contracts,  
9 Defendants cannot accurately argue that adhesion contracts do not relate to personal jurisdiction  
10 issues in the case. Facebook is not required to rely on Defendants' counsel's pure speculation as  
11 the number of such contracts or their relevance as to all Defendants. Defendants should be  
12 required to respond to the interrogatories and document requests.

13 Facebook will take Defendants up on their offer to produce the StudiVZ Terms of Use.  
14 However, Facebook believes it is entitled to all versions of StudiVZ's Terms of use from 2005 to  
15 present. Accordingly, Defendants should be required to produce such items.

16 **C. The Court Should Compel Additional Discovery From The Holtzbrinck**  
17 **Defendants.**

18 **1. Defendants Read Too Much Into The Court's January 28, 2009 Order.**

19 Defendants claim that Facebook's motion to compel as to the Holtzbrinck defendants has  
20 been mooted by Judge Fogel's recent Order. Based on the limited record before it, and additional  
21 misstatements by Defendants, Judge Fogel ordered that Facebook failed to demonstrate a reason  
22 to continue the motion to dismiss hearing as to the Holtzbrinck defendants. However, the Court  
23 stopped short of denying Facebook the right to conduct discovery as to all Defendants.  
24 Therefore, the current motion is far from moot at this time. The Holtzbrinck Defendants are still  
25 parties to this case and should be required to fully respond to the outstanding requests.

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ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Thomas J. Gray  
 THOMAS J. GRAY  
 Attorneys for FACEBOOK, INC.

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Dated: February 17, 2009.

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/s/ Thomas J. Gray

THOMAS J. GRAY